A HISTORICAL STUDY OF THE INFLUENCE OF ENGLISH COMMON LAW ON THE AMERICAN HERITAGE

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CHAPTER I

INTRODUCTION

The effects of English common law upon the American heritage are manifold. Many Americans, through ignorance of their heritage, fail to appreciate these effects. Some of the civil liberties and constitutional rights which Americans take for granted today were not always manifest on the American scene, nor on the English scene for that matter. The American heritage, like the English, has been a progressive thing. It has been changing constantly since earliest colonial times; and it is still changing today. The American people, yearning for security and preferring a static existence, are unwittingly caught up in this state of flux. The fact is that the American heritage, in spite of its changing character, still comprises values that are distinctively human and is the American people's chief assurance of ultimate security.

The English common law has had a more profound influence upon the American way of life than anything else, including religion. Other peoples are religious, steeped in the same cultus as Americans, but have heritages different from that of Americans. Although the American and English heritages were solidly based on religious principles, something had to be added to those principles before these heritages could be forthcoming. Europe is the main source of the American population; yet Europe, except in recent times and largely through the American influence, has a heritage quite different from and in many ways less desirable than those of America and England. The significant difference between

the American-English and the continental European heritages, with the same human and religious factors, has been the common law. It is the purpose of this thesis to show how the common law produced, and is still producing, a lasting effect on the American way of life.

CHAPTER II

ENGLISH COMMON LAW

This chapter will be concerned with background material which, it is hoped, will give understanding to the material that follows it. The research materials used are those found in the bibliography, with specific authorities indicated in the footnotes. Consideration will be given to the definition, origins, historical development, and contents of the English common law.

Definition. Common law is an ambiguous term to define. In the Encyclopaedia Britannica common law is described as "the law common to the whole realm, as distinct from the law peculiar to certain classes of persons such as, in the middle ages, the 'Law Merchant'."[1] A somewhat different definition is found in the Encyclopedia Americana, common law being defined as "the great body of unwritten law in England and the United States as distinguished from the written or statutory law."[2] Britannica agrees with Americana on this latter point and goes on to state that common law can best be defined by contrasting it with statute law, statute law being that promulgated by the sovereign body whereas common law is simply local customary law. Common law is general law for the whole realm, but it has many variations in various districts accord-

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[1] "Common Law," Encyclopaedia Britannica (1946 ed.), VI, 122-23.

[2] "Common Law," Encyclopedia Americana (1951 ed.), VII, 410-14.

ing to the local conditions. Being changeable, the common law also varies in a given district with the times.

Common law has been considered by Englishmen to be a national inheritance or birthright. It is the law of the realm, and it has gone with them wherever they have gone for colonization or rule. They have transplanted English institutions, customs, traditions, laws, procedures, and precedents--all of which constitute the stuff of common or folk-law--with the devotion of a nurseryman caring for his orchids.

At one time the countries of Europe had a sort of common law, but this disappeared at the time of the Renaissance with the revival of the study of jurisprudence. The process of ridding the continent of customary law was known as the "Reception", i.e., the reception of Roman law. England escaped this invasion of Roman law largely through the strong resistance of the Inns of Court, thus preserving the common law. The victory of the Inns of Court, constitutionally, was immeasurable, as were the efforts of the common lawyers. Thus the absolutist doctrines of Roman law were kept out of England. The later despotic claims of the Stuarts failed of realization because of the ingrained liberties of English subjects as imbedded in the English common law. Had Roman law replaced the common law in England as it did in the continental countries, history in England and America would have been different from what it was.

Origins. The origins of English common law, like those of a mongrel, are obscure; yet, paradoxically, the ancestry of common law is

not as questionable as that of an alley cur. Common law originated almost everywhere, yet nowhere in particular. One source is the reports of cases decided in the courts of England; and Britannica in quoting Edmund Burke says that "to put an end to reports is to put an end to the law of England."[3]

Similarly, common law has much of its origin in precedents. Before the time of written law, much deference was paid to precedents; and this concern for precedents, which still exists in English legal circles, accounts for many of the peculiarities of common law. After a passage of several centuries, the accumulation of common law provides a precedent for almost anything. Disputants can easily find substantiation in precedents for their diverse points of view. Precedents constitute the essence of Anglo-Saxon law; and these precedents, according to De Riencourt, entail "a pragmatic concern for time and tradition, for organic growth rather than timeless logic. A law of precedents is utterly opposed to a law of reasons and fosters an immense conservatism."[4] A precedent is a thing of the past which, like a reputation, is more difficult to stop than to start.

The origins of English common law go back as far as the usages and customs of the barbaric ancestors of the Saxon invaders. Long before the written history of the Teutonic tribes began, customs were being established by decisions in the forests. This is probably the earliest form

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[3]Britannica, loc. cit.

[4]Amaury De Riencourt, The Coming Caesars (New York: Coward-McCann, Inc., 1957), p. 118.

of law making. Rules and their observance have a spontaneous evolution in social groups, both primitive and modern; and these, in turn, become usages and customs. Cicero declared customs to be synonymous with law.[5] Hence the usages and customs of the early English are the first sources of English common law.

Historical development. For many centuries the folk customs and precedents were observed and passed on by word of mouth; but with the dawn of written history came attempts to codify the many folk laws. The classic example of a written declaration of common law custom was the Magna Carta of 1215. What had existed as fundamental law became written law, and this long before Parliament came into existence. So great was Magna Carta's influence and weight in the body of English common law that no subsequent Parliament ever presumed to set it aside or even to alter it.

Bruckberger states that "the English thirst for political freedom was first voiced in the Magna Charta."[6] This appears to be one of those general statements with enough truth in them to guarantee their persistence. There are several points of view regarding the significance of Magna Carta in respect to it's being a declaration of the rights of Englishmen. Magna Carta has been described on the one hand as a great charter of liberty and on the other hand as a reactionary feudal docu-

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[5]Americana, loc. cit.

[6]R. L. Bruckberger, Image of America (New York: The Viking Press, 1959), p. 20.

ment. Both these descriptions have their elements of truth. The curbing of royal power and the assertion of rights based on ancient customs are undoubtedly contained in Magna Carta; but it is also true that at the time Magna Carta's provisions were meant to apply only to the feudal barons. The bulk of the English people were still serfs and would remain so for many years to come. As Monaghan puts it: "The chief concern of the barons was to retain their privileges and properties, including serfs, against spoliation by a rapacious king."[7] While it is true that the rebellious barons were acting from selfish motives, it is also true that their agreement with the king became the basis of established principles to which later generations of Englishmen appealed in support of their demands for liberties and the recognition of inalienable rights. Magna Carta "marked the first successful limitation of the royal authority and gave to posterity a symbol of triumph of law over the personal authority of the king."[8] In this sense Magna Carta is the foundation of modern liberties. The fact cannot be denied that in the development of the great body of English common law Magna Carta stands as a landmark.

Usages and customs were for many years interpreted by the old common law courts--the king's bench, common pleas, and exchequer. From these interpretations developed legal precedents which in turn, in some instances, became written law by enactment of Parliament. While much of

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[7]Frank Monaghan, Heritage of Freedom (Princeton: Princeton University Press, 1948), p. 5.

[8]Ibid., p. 6.

the English common law is still unwritten, some of it is in the form of legislation or statutory law. In some instances, the written law has set aside ancient usages and customs--e.g., the statutes of Mortmain and Charitable Uses abolished the ancient perpetuities. For the most part, though, the codification of law in England has been to support the old usages and customs; and insofar as it has done this, the written law of custom is now part of the common law of England in spite of the strict definition of common law in terms of the unwritten law.

Contents. Only briefly do the contents of English common law need to be described, for some have already been indicated. Common law contains usages, customs, legal decisions and interpretations, precedents, and some statutory law based on the ancient wisdom of the people. Such specifics as the right to trial by jury, the right of freemen to have a say in their own government--witness the Saxon "witenagemots" and the Norse "folke things"--and the independence of the judiciary are contained in the English common law. While trial by jury was confirmed by Magna Carta, it is of ancient usage. The English Bill of Rights were, to be sure, acts of Parliament, but they were the codification of old usages and precedents.

The common law is always changing. Feudal tenures and the right of primogeniture, once strong tenets of the common law, have been abolished--and so long ago that they were never part of the common law in America. Thus the common law is both a dying thing and a borning and living thing. The old has been cast aside when the wisdom of the people demanded it, and the new has been added after a suitable lapse of time

and trial. Common law, in the last analysis, is an amalgam which is constantly being tried in the crucible of human experience.

Common law is that great body of law, written and unwritten, based on human usages and customs which the wisdom of the people have found suitable for the ordering of their lives. Its origins are many and varied, going back to ancient barbaric times. It has developed from the folk customs of prehistoric man to the present day. Never a static thing, it is constantly dropping old usages and picking up new ones. The test of what shall become common law has always been that which will contribute to the freedom and rights of the people. Like Topsy, common law just grew; yet, paradoxically, it seems always to have grown in a way that enhanced the inherent dignity and worth of the individual.

CHAPTER III

THE MANIFESTATIONS OF ENGLISH COMMON LAW IN THE UNITED STATES

The transplanting of English common law to North America was a normal development of history. This chapter will show the effects of English common law on the Puritan and colonial heritages and its influence in shaping the Declaration of Independence, the American Constitution, and American law. Also included in this chapter is a discussion of the philosophical roots of the American independence movement as found in the writings of John Locke and Thomas Paine. The authorities are cited in the footnotes.

The Puritan heritage. Contrary to much popular opinion, the early colonists to America did not come with a fanatical desire to set up new political or religious forms. Most of the colonists were from England; and the political theory, religion, and government were those familiar to them in their homeland. They simply transplanted the old forms to new soil. "In their various attempts to solve the problems that soon confronted them they sought merely to adopt to new world conditions the institutions which they already knew."[1]

The Puritans, for example, did not come to America to create a democracy or to establish religious freedom in any broad sense of the

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[1]John D. Hicks, A Short History of American Democracy (Boston: The Riverside Press, Cambridge, 1943), p. 57.

term. Their governmental forms were those of England, and their religious freedom was their own particular brand of toleration for only their own kind. Their conception of religious freedom was a far cry from the modern conception of freedom of religion. All they wanted in respect to religion was the opportunity to practice their own brand. They made no pretense of allowing religious toleration or liberty for anyone else.

The Puritans were, to use a modern term, fundamentalists in their theology and biblical interpretation. The Bible was their Law of God for human behavior, but they also recognized the Natural Law written in the mind and heart of man. Man, they believed, owed allegiance only to God and to conscience. To the Puritans, these ideas were certainties to be taken literally and acted upon. This was their religious creed, although they did not call it that.

In the area of political thought, the Puritans were liberal for their day. God created man free, they believed; and to deny man his freedom, at least in the political domain, was sacrilegious. Bruckberger says that this concept of political freedom, which was at the same time mystical and practical, was a unique contribution of the Puritans.[2] This freedom of conscience to which the Puritans appealed became a part of the American way of life and still holds today--witness the legal protection afforded conscientious objectors in regard to military service.

American democracy had its beginning on board the Mayflower before the Puritans hewed their first log for a cabin, taking the form of the

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[2]R. L. Bruckberger, Image of America (New York: The Viking Press, 1959), p. 22.

Mayflower Compact of 1620. The Mayflower Compact was a temporary agreement to meet the growing threat of mutiny which resulted from the Pilgrims having landed on the shore of New England instead of on that of Virginia as intended. The Puritans had been given permission to settle in Virginia, with certain rights being assured them as part of the deal. The settlers had no legal status in New England. The compact was drawn up as a legal stopgap. There being no recognized legal basis for the establishment of a government in New England, the Puritans succeeded, by the compact, in establishing at least a quasi-legal status by common consent. The Puritans had no intention of writing a constitution; neither had they any conception of or desire to invent a new democratic philosophy of government. All they sought was some workable form of local government. The compact was simply a necessary temporary measure--democratic, to be sure, but probably unintentionally so--to solve their problem of a lack of legal status. The colony they founded "for the glory of God" had as its instrument of government the loose agreement in which the colonists "covenanted and combined themselves together to enact 'just and equitable laws', and pledged themselves to yield to these laws 'all due submission and obedience'."[3]

With the Puritans, therefore, there was no contradiction between democratic thought and behavior in the realm of politics on the one hand and rigid conformity to orthodoxy in the realm of religion on the other.

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[3]Daniel L. Marsh, The American Canon (New York: Abingdon-Cokesbury Press, 1939), p. 18.

Out of this unrealized contradiction grew the Puritan theocracy in which religious orthodoxy and democratic institutions existed side by side. The Puritans founded what Wertenbaker calls a Wilderness Zion, a unique experiment which had no counterpart in England.[4] Considering themselves, like the ancient Hebrews, God's chosen people, the Puritans acted the stiff-necked role so often characteristic of those with a strong sense of divine mission. No doubt the hardships suffered by the Puritans their first winter in America, as described by William Bradford,[5] contributed to their sense of mission and helped to develop their sternness of character. An environment such as that in which the Puritans lived could hardly be expected to produce other than the rigid characters and attitudes exhibited by the Puritans. The combination of Puritan Congregationalism and the Town Meeting system of local government produced a theocracy unique among American institutions.

The colonial heritage. The Puritans took the English common law with them to America, along with the English language and other English institutions, thus establishing it as the foundation of law in what was to become the United States. This transplanting of representative forms of government is a priceless part of the American heritage. Of all the colonizing nations, England was the only one that allowed her colonists

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[4]Thomas J. Wertenbaker, The Puritan Oligarchy (New York: Grosset and Dunlap, 1947), p. 74.

[5]William Bradford, Of Plymouth Plantation, 1620-1647 (New York: Alfred A. Knopf, 1959.

to have popular assemblies, with all the political responsibility that went with them.

Beliefs in such civil rights as freedom of speech and freedom of the press and of assembly, inherent in the thinking of English subjects, were carried to America and amplified. This is not to say that these rights were everywhere secured among English citizens, but the ideas were present and cherished everywhere among them. Other ideas were accepted intellectually if not in fact.

The idea of religious toleration was fostered everywhere in the colonies except in New England. It was conceded, intellectually at least, that various religious groups could and should get along peaceably together; actually, though, there was much dissention between them. As other nationalities than English migrated to America, there developed the theory of racial and national toleration; and here the theory worked out better than in the case of religious toleration. According to Nevins and Commager, English, Irish, German, French, Dutch, and Swedish mingled and intermarried with little thought of any differences between them.[6] Considering the old country traditions, including hatreds fostered by many wars, this was a remarkable development for the times. It is one that has continued and become part of the American heritage. Although religious toleration is old in the American heritage, some religious sects are still barely tolerated. Individual prejudices dissolve slowly,

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[6]Allan Nevins and Henry Commager, America, The Story of a People (Boston: Little, Brown and Company, 1942), p. 58.

even in America; but it is the prerogative of individuals to stand or fall by their own decisions in such matters. This, too, makes up part of the American heritage.

Individualism, always strong in Englishmen, manifested itself in the colonies in a new spirit of individual enterprise. The pressure of life in a new, rich land full of problems contributed to this new spirit, as did the manifold opportunities. The development of the country and the individual spirit went hand in hand.

This dual development gave birth to two distinctly American ideas during the colonial period, according to Nevins and Commager.[7] The first was the democratic idea of equality of opportunity, at least in a rough sense, for all men. Opportunity was one of the chief reasons the colonists came to the New World; and they never lost sight of this dream of a society in which every man, regardless of his station in life at birth, would be privileged to make the most of whatever abilities he had. European caste systems and special privileges had no place in an atmosphere where the common man was king. Although in the beginning this idea of equality of opportunity was hazy in the minds of many, the idea took hold and developed in all areas of American life, notably in the educational and political fields.

The second idea was "the sense that a special destiny awaited the American people and that they had before them a career such as no other nation was likely to achieve."[8] Nevins and Commager goes on to spell

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[7] Ibid., pp. 58-9.

[8] Ibid.

this out in terms of the energy of the people and the atmosphere of freedom which gave to Americans their optimistic outlook on life and their self-confident aggressiveness. This sense of destiny, although present in the colonial period, reached its climax in the nineteenth century expansion westward. All was not good about this cocky optimism, though, for, as Nevins and Commager points out, "it was to lead Americans to rely too easily upon Providence when they should have been taking painful thought to meet their difficulties--it was to make them complacent when they should have been self-critical."[9]

The above two ideas, having their start in the colonial period, gave a unique character to American life. The American character is so unlike any other that Americans are misunderstood, and consequently frequently disliked, in spite of their good intentions, in many parts of the world today.

This distinctive American character is rooted in the conception of the rights of freeborn Englishmen as embodied in the English common law which was transplanted to American colonial soil. The English struggle for liberty, with all its implied ramifications, was already an old one when English colonists came to America. The rights of Englishmen were reasserted in the First Charter of Virginia in 1606. The settlers in Virginia were guaranteed by their charter that they would "HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding

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[9]Ibid.

and born, within this our Realm of England . . . ."[10] It is significant that the settlers in Virginia were guaranteed the protection of Magna Carta and the common law.

To get such guarantees in a charter, though, was one thing; to enjoy the rights and liberties of free Englishmen in fact was another. From the beginning in Virginia, the Crown, as represented by the governor, tried to encroach upon these guarantees. The colonists retaliated with vigor. The Virginia legislature, established in 1619, took its work seriously and enacted a number of laws which turned out to be displeasing to the Crown. Among these was one in which the House of Burgesses prohibited the governor from levying taxes without legislative permission. This plucked at the purse strings of royal authority. The House of Burgesses further insisted that all money raised must be spent as it directed. The burgesses then protected themselves with a law exempting themselves from arrest, and another safeguarding trial by jury for all. Later the House of Burgesses declared that nothing might set aside a legislative act. All went well with the legislative efforts in Virginia as long as the Commonwealth in England lasted; but with the Stuart Restoration in 1660, the legislature again became subservient to the royal governor.

The citizens of Connecticut fared somewhat better than those of Virginia. The first written constitution in America was the Fundamental Orders of Connecticut, drawn up by the colonists in 1639. This was

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[10]William MacDonald, ed., Documentary Source Book of American History, 1606-1913 (New York: The MacMillan Company, 1925), p. 7.

replaced after the Stuart Restoration by the new Crown Charter of 1662. The new charter was liberal in scope and gave freemen the power to govern themselves as they saw fit as long as their laws were not contrary to the laws of England.[11]

Rhode Island, like Connecticut, was fortunate in securing a measure of self government. The new Crown Charter of 1663 made Rhode Island virtually an independent republic. The citizens were allowed to elect their own officers and make their own laws. Under the new charter the people of Rhode Island were probably the freest on earth. The status of Rhode Island and Connecticut as self-governing commonwealths was unique in the seventeenth and eighteenth centuries. The other colonies were not as fortunate, being either Crown colonies or proprietary colonies.

For the most part, all the English colonists enjoyed a measure of political and personal freedom unknown in other parts of the world in the seventeenth and eighteenth centuries. Crown tyranny was more a catchword than a fact. There were other kinds of tyranny, though. In the intensity of its tyranny, the theocracy of New England has known few peers. The small ruling class ruled harshly and without appeal. In the South, the patrician landed gentry had a virtual monopoly on everything, even life. Class tyranny also sprang up from time to time.

One of the most notable examples of this latter type of tyranny was the maltreatment of laborers and indentured servants in Virginia which helped to bring on Bacon's Rebellion in 1676. Actually, the colon-

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[11] Ibid., p. 23.

ists endured more tyranny among themselves than they did from the hands of the British. It is the old story of enduring from the members of one's own family hurts which would not be tolerated from others. The colonists quarreled among themselves with impugnity, but they made great issue of the slight differences between themselves and the Crown.

Thus the colonists were united against outsiders (England and France) and separated and individualistic among themselves. From this colonial beginning the distinctive American nationality has emerged. Nevins and Commager points out that this American nationality was caused by two factors: (1) the amalgamation of several national groups into a new people, and (2) the nature of the land--rich, empty, and bountiful to all who would conquer it.[12] This unique American society, with its distinctive social, economic, and political traits, was well into its development by the time of the Declaration of Independence.

The Declaration of Independence. "At the time of the Revolution probably three-fourths to nine-tenths of the white colonists were still of British blood."[13] Migrations of those with the same language, traditions, and institutions gave the country a general unity. Americans had a sense of belonging together. The colonists had been together long enough for them to think of even their mother country as an outsider. The American Revolution was not so much a revolution for the rights of

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[12]Allan Nevins and Henry Commager, America, The Story of a People (Boston: Little, Brown and Company, 1942), p. 28.

[13]Ibid., p. 29.

man as it was a political reaction against British control. The colonists wanted local control. As far as rights were concerned, they had little cause for complaint. The common law was well established by 1776. For more than a hundred and fifty years the colonists had been carrying on constitutional experiments and, at least to some extent, practicing civil liberties. Yet, if one discounts the charters of Connecticut and Rhode Island, no formal document had so far drawn all the random constitutional ideas and practices together into a universally recognized statement of principles. Thomas Jefferson's work on the Declaration of Independence was the first effort in this area. In the Declaration of Independence, Jefferson also brought to a head the contents of the many tracts and pamphlets the colonial writers had produced.

The colonial writers and pamphleteers had leaned heavily on the ideas of the Whig Revolution (1688) writers, notably those of John Locke. The gist of the American Declaration of Independence is contained in Locke's Two Treatises of Government, first published in 1690. Locke held the view that all rightful government is based upon the inalienable rights of the individual. In this he disagreed with Hobbes who held that individual rights were created by civil government. Only in the community as a whole, Locke believed, can be found the authority to organize a government and to define its powers. Locke thought of democracy more as a spirit than as a form of government. This is in the tradition of English common law, for it, too, is more spirit than substance. The familiar phrase, "life, liberty, and property", and the assertion that the people have a right and a duty to abolish or change a government are the

fruits of Locke's brain. The colonial writers, including Jefferson, borrowed freely from Locke.

In a sense Locke was the philosopher behind the American Revolution as Nietzsche was the philosopher behind National Socialism, although probably neither Locke nor Nietzsche realized the impact their ideas would have. Locke had intended only to justify the revolution of Parliament against the Crown in 1688. The colonists used Locke's principles to justify their own revolution against both Crown and Parliament. Locke's book was picked by the colonists because it supported their own political ideas and cause. Locke was not the source of their ideas--these came from the English common law--but he gave written expression to their ideas, and they paid him the compliment of quoting him almost verbatim. "If Locke had never written, the American English would still have known what they wanted; all Locke did was formulate what they already believed and thus gave them a tactical advantage over Parliament."[14]

Thomas Paine, at thirty-nine a misfit and colonial beatnik, had a more immediate effect upon the colonial American mind than did John Locke. His forty-seven page pamphlet, Common Sense, sold more than 100,000 copies at two shillings each.[15] It urged immediate independence on the grounds of America's moral obligation to humanity, pointing out that the cause of liberty in America was the cause of liberty everywhere.

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[14]R. L. Bruckberger, Image of America (New York: The Viking Press, 1959), p. 25.

[15]Frank Monaghan, Heritage of Freedom (Princeton: Princeton University Press, 1948), p. 26.

Much was made of this idea of America's destiny as the chief proponent of freedom in an unfree world during the 1960 election campaign; thus, like old soldiers, Tom Paine never dies. Monaghan asserts that no single speech or publication did more to electrify public opinion and give courage to the timid than Tom Paine's pamphlet.[16] Basically it was an expression of the familiar English common law.

The fathers of the American Revolution, particularly John Adams, were well grounded in the common law tradition and the constitutional theories of Bracton, Coke, and Blackstone. In addition, the leading spirits in the fight for liberty were well versed in natural law. One thing the leaders insisted on was legality; and they constantly sought to find legal justification for their actions by citing either common law or natural law. The idea of "no taxation without representation" became a hot issue; and the reason for it becoming central in the dispute with England, according to Ward, lay in the colonists' insistence upon conducting "their affairs with the fullest legality and to avoid any suggestion of a break in the past in which . . . the constitutional rights and liberties they sought were incorporated and enshrined."[17]

This concern for legality left moral overtones in the American heritage. After the Spanish-American War, America suddenly found itself an imperialistic power. The old feeling about taxation without repre-

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[16]Ibid.

[17]Barbara Ward, Faith and Freedom (New York: W. W. Norton and Company, Inc., 1954), p. 154.

sentation being wrong again arose and caused much concern among some Americans, particularly those in the government. Many Americans were reluctant to have their country become a colonial power. Such a role had a double curse on it, they believed. It put America in the same position as England had been in 1775, and it was immoral. The feeling was quieted by necessity and much moral rationalization. The reluctance to be in this position, however, has persisted; and America has tried to give independence to her colonial peoples as soon as possible. This heritage of representative government, Americans believe, is not only legal but moral; and it should be violated only in cases of extreme necessity.

The American Constitution. The American Constitution did not begin or end with the Constitutional Convention of 1787. The American Constitution "was the result of a long evolutionary process extending back through the earlier national and colonial periods far into remote English history."[18] Many of the ideas and principles contained in the American Constitution came from the English Constitution which, unlike the American Constitution, is mostly unwritten.

From the English Constitution came the ideas of a three-branch government, the power of the legislature to initiate and control taxation, and the power of the legislature to impeach the President. Such privileges as freedom of speech, freedom from unwarranted arrest, and

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[18]E. M. Eriksson, American Constitutional History (New York: W. W. Norton and Company, Inc., 1933), p. 1.

freedom of assembly also came from the unwritten law of England. The right of trial by jury came from the Magna Carta and was incorporated into the sixth and seventh amendments to the American Constitution. Other amendments are also directly traceable to English precedents.

There is a close similarity between the fifth and fourteenth amendments to the American Constitution and the Petition of Rights which Parliament urged on Charles I in 1628, particularly in the prohibition against imprisonment without due process of law. Writs of Habeas Corpus in England are as old as the thirteenth century, but the interpretation of the idea imbedded in the American Constitution dates to a definitive act of Parliament passed in 1679. The writ of Habeas Corpus is possibly the oldest and most important safeguard to personal liberty recognized by the laws of England and America. It was Charles Pinckney of South Carolina who introduced the Habeas Corpus clause at the Constitutional Convention of 1787. The eighth amendment to the American Constitution guarantees American citizens against excessive bail and fines and the infliction of unusual punishments. These were guaranteed to Englishmen in the Bill of Rights passed by Parliament in 1689.

The writers of the American Constitution probably did not plagiarize the English Constitution at their Constitutional Convention in 1787. There was no need for it. They had lived under these guarantees and knew them well. They simply included the guarantees, gleaned from their experience, in the national and state constitutions after the Revolution. The American Constitution as a written document was unique in its day of origin. It has been the pattern for many subsequent constitutions in

other countries. It is a short document containing only a few thousand words, but its importance in American history and in the histories of other countries has been immeasurable.

American law. The American heritage is one of law. American institutions are based on the principle of the rule of law, not of men. De Riencourt points out that this is one of the notable differences between European law and English and American law.[19] English law and its offspring, American law, have had little in common with continental European law since the Renaissance.

The same regard for precedents is found in American law as in English law. Interpretations of the Declaration of Independence, of the Constitution, of the Bill of Rights and other amendments, and the speeches of the great Presidents are constantly studied and reinterpreted. The accumulation of precedents and interpretations has had a notable effect on the American heritage and way of life. The American judiciary has been fortunate in having the Constitution as a constant factor in its own haphazard development. "American justice is based on the Constitution rather than on laws, since the latter can be invalidated by branding them unconstitutional."[20] This judiciary power to cancel legislation, inherent in the Constitution, is unique and original in the American judiciary system.

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[19]Amaury De Riencourt, The Coming Caesars (New York: Coward-McCann, Inc., 1957), p. 116.

[20]Ibid.

The roots of American law lie deep in the English common law. English common law has been greatly amended to fit the American scene, particularly since the War of 1812 and the subsequent migrations westward. The American frontier had its own amending effect on English common law, especially in respect to some of the more antiquated aspects of it. It would be hard to imagine entail and primogeniture appealing to the freewheeling instincts of the western frontiersman. On the American frontier the law of reason and of the six-gun prevailed, effecting the American way of life to the present day. Rigid codified law does not exist in America as it does in Europe. American law, like English law, is as obscure as legislation, an illogical accumulation of case precedents, traditions, and constant change can make it.

This legal confusion has made the lawyer an important person in America. His influence has steadily increased as the common man has gained access to the courts, thanks to the growth of democracy and the destruction of the privileges of the landed gentry. This power of the lawyers and their concern for the common man has probably helped America to endure its democratic growing pains without serious disorders or upheavals among the lower classes. The esteem with which the legal profession has been held can be seen in a survey of those who have held the office of President of the United States. Twenty-five Presidents, including the incumbent, have been either lawyers or have had some connection with the legal profession as members of the Congress or as judges. At any given time from half to two-thirds of the members of the Congress are lawyers. The common man, with his democratic equality, has

made the lawyers an indispensable part of the American way of life. "They became the trustees of America's historical destiny."[21]

Lawyers become important in a country where a considerable amount of common law prevails. Where law is codified and rigid, any layman can, if he studies a law book, understand the code. In America, though, the law is not as rigidly defined as it is in Europe. Here the general doctrines of English common law are held to be in force except where statutes have specifically amended the English common law or where clear judicial decisions to the contrary have been made. Louisiana, whose law is founded directly on Roman civil law, is an exception to this general principle; but even in Louisiana statutes and judicial decisions have brought some conformity to the common law.

It may be said as a general principle that there is no Federal common law in America. "The law which the Federal courts apply consists wholly and exclusively of the Federal Constitution, treaties, the statutes of Congress, and the laws common and statutory of the several states of the Union."[22] However, this general principle that there is no Federal common law needs to be qualified. Where there are no legislative provisions to the contrary, general common-law principles are observed. Matters of interstate commerce and other matters coming under the jurisdiction of the Federal government are examples of this. Thus, while the

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[21] Ibid., p. 118

[22] W. W. Willoughby, Principles of Constitutional Law of the United States, 2nd ed. (New York: Baker, Voorhis and Company, 1938), p. 559.

Constitution does not adopt the common law, common law's existence and continuation are recognized in the provisions of the Constitution as being part of the laws of the States with which the Federal government may not tamper.

Federal courts have no jurisdiction over common law crimes. In legal actions between citizens of different states, however, involving ordinary legal rights, Federal courts "necessarily take cognizance of the principles of the common law governing the cases thus brought before them."[23]

Among the States of the Union, statutory law and judicial dicta vary. The common legal denominator in the eclectic legal situation among the States is the English common law, modified by American usage and judicial precedent. With the exception of statutory enactment, varied customs, and judicial determinations, though, which have brought on important differences in the legal climates of the several States, the non-statutory law of the States is fairly uniform throughout the country.

It may be said in summary that the Puritan heritage, the colonial heritage, the principles of the Declaration of Independence and of the Constitution, and the philosophical and legal bases of the distinctive American character are traceable to English common law which was transplanted to America by English colonists. The common law has been modified to fit American peculiarities, but it is still basically English common law.

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[23]"Common Law," Encyclopedia Americana (1951 ed.), VII, p. 414.

CHAPTER IV

THE AMERICAN WAY OF LIFE

Out of English common law and its application to the American scene has come a way of life unique among the peoples of the earth. Laws and judicial decisions have borne out what the Founding Fathers intended when they drew up the Declaration of Independence in 1776--namely, that all men are equal in both political privilege and political obligation. It is the function of just government to see that this privilege of equal men is protected and to encourage them to fulfill their equal obligations to their government. The American Constitution was "the crowning of the toilsome evolution of the ages. All the political strivings of the past from Marathon . . . to Runnymede . . . are alive in our republic today."[1]

The liberties the American people enjoy today and take so much for granted had their beginnings in English common law. The principles of common law are imbedded in the American Constitution. Constitutional government has in turn protected the liberties which have constituted the principal struggle of man for the last several centuries. The process has run in a non-vicious circle. The yearnings of men wanting to be free produced the common law. Common law principles constitute the stuff of the American Constitution which, in turn, preserves the liberties of free men.

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[1]Daniel L. Marsh, The American Canon (New York: Abingdon-Cokesbury Press, 1939), p. 31.

The American way of life is a nebulous thing to define. Maybe it cannot be defined except in terms of the results of the common law and its corollary, constitutional government. At least, though, the American way of life is a distinctive attitude towards man and all phases of life in general. This attitude is manifested in such things as individualism, democratic principles, enterprise, courage, humor, fair play, sympathy for the underdog, and the recognition of the inherent worth and dignity of every man as a creature made in the image of God.

The conquering of the land had much to do with the development of this attitude; and although the geographical frontier has gone, the human characteristics which subdued it still exist and are at work on new economic, social, and technical frontiers. It is the genius of the American people that they can adjust to new situations and new frontiers without losing the basic character with which they started in 1620. So long as the American people can adjust, laugh at themselves, and be self-critical of themselves and of their government, the American way of life will endure.

America in these days of nuclear war potential may be destroyed; but the spirit of the American people, so long in developing out of the Saxon moors and forests of England, can only be destroyed by the people themselves. If that day ever comes, life will not be worth having, nuclear destruction or no nuclear destruction; for, as Patrick Henry once said in St. John's Church in Richmond, "Give me liberty, or give me death." The reason his words have been remembered is that they express the basic philosophy, a development from English common law, underlying

the American way of life. Americans would never take kindly to slavery. Any form of tyranny which would deprive the American people of their freedom and democratic way of life would be intolerable. The common law has not only produced the American heritage, it is one of the American people's chief guarantees that their way of life shall not perish from the earth.

THE END

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